

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

BACKGRID USA, INC., a California corporation,

Plaintiff

-v-

TUMBLR, INC., a Delaware corporation; AUTOMATTIC, INC. a Delaware corporation; and DOES 1-10, inclusive,

Defendants.

CASE NO. 1:20-cv-3167

**COMPLAINT FOR
COPYRIGHT INFRINGEMENT**

DEMAND FOR JURY TRIAL

Plaintiff Backgrid USA, Inc. (“Backgrid”) complains against Defendants Tumblr, Inc. (“Tumblr”), Automattic, Inc. (“Automattic”), and Does 1-10 (collectively, “Defendants”) as follows:

PRELIMINARY STATEMENT

1. Backgrid is the world’s premier celebrity-photograph agency. Its many photographers earn their living from the license fees Backgrid receives from the authorized use of their photographs of famous people (the “Backgrid Photographs”) and the timely registered photographs at issue in the copyright infringement claim herein (the “Celebrity Photographs”). Backgrid licenses the use of its photographs, including the Backgrid Photographs to top news and celebrity publications. To protect its business, Backgrid must prevent its photographs from being copied and unlawfully published on the Internet, where

they can be freely accessed by anyone. As part of its constant battle to prevent piracy, Backgrid incurs substantial expenses to send thousands of Digital Millennium Copyright Act (“DMCA”) take-down notifications annually to websites that allow third-party infringers to post unlawfully copied photographs for unauthorized public display and distribution to others. Such unauthorized public display and distribution lowers the value of the photographs to legitimate licensees and, accordingly reduces the licensing fees the Backgrid Photographs can command.

2. Twenty years ago, the infamous Napster file-sharing service grievously injured the music industry by allowing users to upload unauthorized music files for unlicensed public distribution. Defendants Tumblr and its parent, Automattic (through its Wordpress platform), are now applying the same unlawful business model to the celebrity and hot news photography businesses. Specifically, defendants allow and encourage their users to upload and share Backgrid’s photographs without regard to copyright law, and even provide a tool for their users to do so. As with Napster, the success of Tumblr’s and Automattic’s business models depends on massive copyright infringement to draw users to their websites. And like Napster, it is in defendants’ interest to turn a blind eye to the unlawful conduct they facilitate and encourage.

3. To that end, Tumblr scrubs all metadata from the infringed photographs its users upload. The metadata removed by Tumblr of the Backgrid Photographs includes information that would notify others the photographs are subject to copyright protection (“Copyright © 2020 BACKGRID, Inc.”), the e-mail address to request licensing information and a licensing agreement (usasales@backgrid.com), and information identifying the works. In doing so, it interferes with the standard technical measures Backgrid and other photograph agencies typically use to protect valuable photographs. Doing so violates 17 U.S.C. § 512(i)(1), which prohibits interference with “standard technical measures.” The DMCA defines such measures as those that (1) are “used by copyright owners to identify or protect copyrighted works”; (2) “have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process”; (3) “are available to any person on reasonable and nondiscriminatory terms”; and (4) “do not impose substantial costs on service providers or substantial burdens on their systems or networks.” 17 U.S.C. § 512(i)(2).

4. Although photograph copyright owners, including Backgrid, annually send thousands of “take-down” notices to defendants as provided by the DMCA, defendants claim they never received a substantial portion of those notices. They then rely on their alleged failure to receive take-down notices as justification for

allowing infringing Celebrity Photographs to remain posted, published to the public, and available for download by other infringers.

5. Even when defendants do acknowledge receiving take-down notices, they cynically interpret the DMCA's provision requiring "expeditious" action in response to take-down notices as allowing them to wait, in some instances, waiting even many months before taking down infringing content. Upon information and belief, they nevertheless claim safe harbor protection under Title 17, Sections 512(c) and (d).

6. Demonstrating their failure to take expeditious action, defendants have received up to three take-down notices advising them that specific photographs on Tumblr infringe Backgrid Photographs but as of the filing of this Complaint, they remain live on the Tumblr. The first notices were DMCA take-down notification sent as part of Backgrid's ordinary enforcement efforts. Backgrid provided a second notice when it attempted to resolve this dispute with Tumblr directly by soft-serving a draft complaint with copies of the DMCA take-down notices attached. The third notice was provided when Backgrid attempted to resolve this dispute with Automattic and the draft complaint was shared with both Automattic and Tumblr's counsel.

7. To permit the rampant infringement that drives users to their sites, defendants have failed to adopt and reasonably implement a policy for terminating

repeat infringers as required by 17 U.S.C. § 512(i). Accordingly, defendants cannot satisfy even the threshold requirement for passive Internet service provider (“ISP”) safe harbor protection under the DMCA. And, when defendants do take action against a repeat infringer, defendants allow the infringing content that was posted on the account to remain live on other accounts, thus requiring Backgrid and other copyright holders to engage in an endless “whack-a-mole” game while trying to protect their work from infringement. For example, during settlement discussions Backgrid identified an account that was the subject of at least 95 take-down notifications. Although that account, BetterSource4You, was ultimately taken down after Backgrid identified it to Tumblr, the content posted by BetterSource4You continues to be distributed and displayed by other Tumblr accounts.

8. Because the presence of infringing photographs of great interest to the public attracts users to their sites, defendants do not expeditiously remove content in response to DMCA take-down notifications. Their failure and refusal to do so vitiates any safe harbor protection that might otherwise be available under Title 17, Section 512(c) & (d). Even as much as 15 months later, content for which a DMCA take-down notice was sent remains live on the Tumblr platform.

9. Automattic also creates cached copies of infringements, which on information and belief are stored for two years. Because the safe harbor under

Title 17, Section 512(b) provides a safe harbor only for “temporary” storage of a work, Automattic’s caching has pierced the safe harbor under 512(b).

10. Backgrid attempted to resolve the parties’ dispute without resort to litigation, but because making infringing content available to their users is essential to their business success, defendants and Backgrid have been unable to resolve this dispute.

JURISDICTION AND VENUE

11. This is a civil action for direct, contributory, and vicarious copyright infringement under the Copyright Act, 17 U.S.C. §§ 101 *et seq.* This Court has subject matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1332, 17 U.S.C. § 501(a), and 28 U.S.C. § 1338(a) and (b).

12. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c) and 28 U.S.C. § 1400(a) in that the claim arises in this Judicial District, the defendants may be found and transact business in this Judicial District, and the injury suffered by Backgrid took place, and is taking place, in this Judicial District. Defendants are subject to the general and specific personal jurisdiction of this Court because of their contacts with the State of New York. Specifically, Tumblr’s principal place of business is in Manhattan and Automattic has a physical presence in Manhattan. Automattic’s website discloses that it employs at least 13 persons in Manhattan. Defendants have engaged in continuous and systematic business in

New York and, upon information and belief, derive substantial revenues from commercial activities in New York. Tumblr and Automattic have also engaged in multiple acts directed toward New York, including without limitation: soliciting and engaging in numerous commercial transactions with New York users, operating highly interactive websites, publishing targeted advertisements and sponsored posts to New York users, and using the lure of infringing materials to openly encourage New York users to visit their websites. As a result, there is a direct and substantial nexus between Backgrid's claims in this case and defendants' transaction of business with their New York users.

PARTIES

13. Plaintiff Backgrid is incorporated in and existing under the laws of the State of California, with its principal place of business located in Redondo Beach, California.

14. Defendant Tumblr is incorporated in and existing under the laws of the State of Delaware, with its principal place of business in New York, New York.

15. Defendant Automattic is incorporated in and existing under the laws of the State of Delaware, with its principal place of business in San Francisco, California. On information and belief, Automattic acquired Tumblr in or about August 2019 and now owns it.

16. The true names or capacities, whether individual, corporate or otherwise, of the defendants named herein as DOES 1 through 10, inclusive, are unknown to Backgrid, who therefore sues said defendants by such fictitious names. Backgrid will ask leave of Court to amend this Complaint to insert the true names and capacities of said defendants when the same have been ascertained.

FACTS COMMON TO ALL COUNTS

Backgrid and the Photographs that Frame this Dispute

17. Backgrid is the world's premier celebrity-related photograph agency and provides real-time images of celebrities around the world to top news and lifestyle outlets. Its photographs increase the sales of its customers' magazines and newspapers and increase their website traffic and website viewer engagement. Backgrid's photographs are regularly licensed by *People* magazine, the *Huffington Post*, the *Daily Mail*, *TMZ*, *US Weekly*, *Radar Online*, *Harper's Bazaar*, *Entertainment Tonight*, *Vogue*, *Elle* magazine, and many other publications.

18. Backgrid owns all rights to the Celebrity Photographs, each of which was timely registered with the United States Copyright Office. True and correct copies of the certificates of copyright registration for the Celebrity Photographs known to have been infringed are collectively attached as Exhibit A-1 (for the works infringed by Tumblr) and Exhibit A-2 (for the works infringed on Wordpress). Due to defendants' continuing infringements and refusal to adopt and

reasonably implement a DMCA take-down policy, including their continuing refusal to take down infringements on a regular basis, the number of timely registered infringements on Tumblr and Wordpress, and the damages for which defendants are responsible, is continually increasing. Backgrid seeks to recover for all such infringements whether they are specifically alleged herein or not.

19. For valuable consideration, Backgrid and/or AKM-GSI Media, Inc. (“AKM-GSI”), the predecessor in interest to certain of Backgrid’s Celebrity Photographs, have licensed, and Backgrid continues to license, the rights to reproduce, distribute, and publicly display the Celebrity Photographs and make derivative versions thereof, to hundreds of magazines, newspapers, television stations and other media outlets throughout the world.

Defendants’ Platforms

20. Defendants’ businesses are characterized by their simple, but spectacularly profitable, provision of public blogging platforms that enable users to share photographs publicly. On information and belief, Tumblr owns, operates and controls the Tumblr platform. Micro-blogs created using Tumblr are streamed to other Tumblr users through a Tumblr dashboard. Tumblrs’ dashboard function selects, orders, and/or arranges content to display to other Tumblr users, including content from Tumblr blogs that are not among those “followed” by those users.

21. Automattic owns, operates, and/or controls Wordpress. Wordpress allows users to create websites. Wordpress also has an interface that permits its users to search for content on Wordpress. Wordpress then selects, orders, and/or arranges that content. A simple search for Backgrid's photographs reveals a staggering level of infringement on Wordpress sites that can be downloaded and republished again and again.

22. On information and belief, as of March 1, 2019, Tumblr hosted over 459 million blogs and more than 136.5 billion posts, with 20 million posts being added to its site every day. Tumblr generates income from ad revenues and operates one of the world's most visited websites.

23. On information and belief, Automattic closed its funding in September 2019 after achieving a \$3 billion valuation. With the addition of those who operate Tumblr, it now has 1,200 employees. In addition to its popular web publishing platform Wordpress, it provides certain add-ons, including a Wordpress VIP service using the JetPack Plugin, a security and site performance tool, and WooCommerce, an eCommerce platform. Wordpress represents on its website that it powers 32% of the entire web and touts itself as easy to use, flexible, and a fast solution for building a website. Like Tumblr, Automattic makes money through advertising it places on users' websites. In exchange, it allows its users to

build their websites for free, later selling them upgrades that eliminate the advertisements and permit the use of its VIP and plugin services.

24. A significant factor enabling defendants to drive massive amounts of traffic to the Tumblr.com and Wordpress.com domains is the presence of sought-after and searched-for celebrity images uploaded onto the users' accounts without the consent of the third-party copyright owners. Defendants are aware of the massive scale of copyright infringement they facilitate and encourage, and of the revenue and profits such infringement generates for them.

25. Defendants actively encourage their sites' users to infringe. For example, Tumblr directs users to add photographs "from the web" and contributes to their ensuing acts of infringement by providing an easy to use push-button feature for that purpose, as well as dashboard features that share the photographs with other users. Attached as Exhibit B-1 are true and correct copies of screenshots showing the push-button infringement tool and illustrating how easily a Backgrid photograph unlawfully copied from TMZ.com, a popular entertainment news website, can be uploaded to Tumblr. Attached as Exhibit B-2 are true and correct copies of Wordpress screenshots showing that Wordpress offers the identical feature. When users point defendants' push buttons at copyright protected photographs, defendants then directly infringe by putting unauthorized copies on their servers, complete with defendants' own identification numbers.

Tumblr Does Not Terminate Repeat Infringers as Required for Safe Harbor

Protection Under 17 U.S.C. § 512(i)

26. Defendants claim to have DMCA compliant take-down policies set forth in their websites' Terms of Service. Based thereon, they claim that the DMCA's safe harbor protection for ISPs with DMCA compliant take-down policies shields them from liability for the massive number of infringements they both contribute to and engage in daily. But such lip service compliance with the DMCA is merely a fig leaf to hide their systematic abuse of the rights of photograph copyright holders and protect their enormous profits derived from such infringement.

27. A threshold requirement for DMCA safe harbor protection is that the ISP must have “adopted *and reasonably implemented* … a policy that provides for the termination in appropriate circumstances of subscribers and account holders … who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A) (emphasis added).

28. Although Tumblr's Terms of Service provide that copyright owners may send a DMCA takedown notice and further state that, “Tumblr may immediately terminate or suspend Accounts that have been flagged for repeat copyright infringement,” its purported policy is honored in the breach. Similarly, Wordpress' Terms of Service provide that copyright owners may send a DMCA take-down notice and warn that, “[w]e will terminate a visitor's access to and use

of the website if, under appropriate circumstances, the visitor is determined to be a repeat infringer of the copyrights or other intellectual property rights of Automattic or others.” Unfortunately, that resounding promise is but a hollow threat.

29. Industry standard practices have resulted in the widespread adoption and implementation by legitimate ISPs of a “three-strikes” policy with respect to repeat infringers. The industry standard requires that to qualify for the DMCA safe harbor protection, ISPs must terminate the accounts of users that have been the subject of three infringement complaints. Defendants, however, regularly fail and refuse to comport with the industry standard.

30. Defendants’ failure to reasonably implement a policy resulting in the expeditious removal of infringing photographs owned by Backgrid and others and/or their failure and refusal to terminate subscribers shown to be repeat infringers divests them of DMCA safe harbor protection and renders them not just directly but contributory and vicariously liable for the infringement of Backgrid’s Celebrity Photographs as described herein.

Tumblr Has Not Terminated Infringing Accounts Notwithstanding Backgrid’s Issuance of Numerous Take-down Notifications

31. Backgrid (and/or the predecessor in interest at the time of certain of the Backgrid Photographs, AKM-GSI) sent Tumblr ***at least 10 DMCA take-down***

notifications encompassing *at least 6 infringing photographs* on the captainevans account *at least twice*.

32. Specifically, it sent the notices described in sub-paragraphs a.-j. on or around dates alleged therein and it provided all notices to Tumblr again in August 2019:

- a. July 29, 2018, for the work reproduced, distributed and displayed at captainevans.tumblr.com/post/172297475756/milajedora-the-captains-perfect-blonde-hair and saved at 78.media.tumblr.com/83ffb5d4eeb3c06fe2d2c3c717529ff2/tumblr_p60g3aMSDv1w7d305o1_400.png.
- b. July 30, 2018, for the work reproduced, distributed and displayed at captainevans.tumblr.com/post/172297475756/milajedora-the-captains-perfect-blonde-hair and saved at 78.media.tumblr.com/054f9c0b221d938d6a32b18a69551216/tumb_lr_p60g3aMSDv1w7d305o2_400.png.
- c. September 18, 2018, for the work reproduced, distributed and displayed at captainevans.tumblr.com/post/177888691371/captainameriicas-chris-evans-on-set-of-avengers and saved at

78.media.tumblr.com/743ac93e7687884d6c1be176973917ce/tumb
lr_pep6ycedcg1vifzjto1_1280.jpg.

- d. September 20, 2018, for the work reproduced, distributed and displayed at
captainevans.tumblr.com/post/177888691371/captainameriicas-chris-evans-on-set-of-avengers and saved at
78.media.tumblr.com/9a7caab81114caa6050fcb8595470a46/tumb
lr_pep6ycedcg1vifzjto3_1280.jpg.
- e. September 21, 2018, for the work reproduced, distributed and displayed at
captainevans.tumblr.com/post/177888691371/captainameriicas-chris-evans-on-set-of-avengers and saved at
78.media.tumblr.com/75dd8571234fc6bef545c7b9d033724b/tumb
lr_pep6ycedcg1vifzjto2_640.jpg.
- f. September 22, 2018, for the work reproduced, distributed and displayed at
captainevans.tumblr.com/post/177888691371/captainameriicas-chris-evans-on-set-of-avengers and saved at
78.media.tumblr.com/4a5a935077a6205334c8ed577d624769/tumb
lr_pep6ycedcg1vifzjto4_1280.jpg.

- g. September 23, 2018, for the work reproduced, distributed and displayed at
captainevans.tumblr.com/post/177975856167/captainameriicas-chris-evans-on-set-of-avengers and saved at
78.media.tumblr.com/743ac93e7687884d6c1be176973917ce/tumblr_pep6ycedcg1vifzjto1_1280.jpg.
- h. September 25, 2018, for the work reproduced, distributed and displayed at
captainevans.tumblr.com/post/177975856167/captainameriicas-chris-evans-on-set-of-avengers and saved at
78.media.tumblr.com/9a7caab81114caa6050fcb8595470a46/tumblr_pep6ycedcg1vifzjto3_1280.jpg.
- i. September 26, 2018, for the work reproduced, distributed and displayed at
captainevans.tumblr.com/post/177975856167/captainameriicas-chris-evans-on-set-of-avengers and saved at
78.media.tumblr.com/75dd8571234fc6bef545c7b9d033724b/tumblr_pep6ycedcg1vifzjto2_640.jpg.
- j. September 28, 2018, for the work reproduced, distributed and displayed at

captainevans.tumblr.com/post/177975856167/captainamericas-chris-evans-on-set-of-avengers and saved at
78.media.tumblr.com/4a5a935077a6205334c8ed577d624769/tumblr_pep6ycedcg1vifzjto4_1280.jpg.

33. In September 2019, Backgrid sent yet another DMCA takedown notice concerning the captainevans account for the infringement displayed at captainevans.tumblr.com/post/177844819204/cevansedit-chris-evans-on-the-set-of-avengers-4 and saved at
66.media.tumblr.com/bfb7158870d2acb4f46aca21e6b642ee/tumblr_pep8lucwvM1xcxv1vo1_540.png.

34. Despite the take-down notices as outlined above, the captainevans account remains live and active.

35. Backgrid or the predecessor in interest of certain Backgrid Photographs, AKM-GSI, sent Tumblr ***at least 12 DMCA take-down notifications*** encompassing ***at least 12 infringing photographs*** on the taylorsv1t account as alleged in sub-paragraphs a.-h., below, on or around:

- a. July 28, 2018, for the work reproduced, distributed and displayed at taylorsv1t.tumblr.com/post/164911733041/taylor-swift-serves-as-bridesmaid-at-abigail and saved at

78.media.tumblr.com/3bafcbc78ef0ba6c368000f3025b816e/tumblr
_ovoies1GB4J1tuej5fo1_540.png.

b. February 22, 2019, for the work reproduced, distributed and displayed at taylorsvint.tumblr.com/post/146878615551/ and saved at

https://66.media.tumblr.com/55d09c11bfedcae480c8d6d88d82534f/tumblr_o9rtptsmx011svd4qjo4_540.jpg.

c. February 28, 2019 for the work reproduced, distributed and displayed taylorsvint.tumblr.com/post/146878746446/ and saved at https://66.media.tumblr.com/a3fedf86f96f105d2e863cad07b7d4dd/tumblr_o9rtrfPxwY1qj4rgqo1_1280.jpg.

d. February 29, 2019 for the work reproduced, distributed and displayed taylorsvint.tumblr.com/post/146878596666/ and saved at https://66.media.tumblr.com/7c2f5472c3a9d38e043152f06a8d92fb/tumblr_o9ru9slA4y1qb86xno1_1280.jpg.

e. March 1, 2019, for the work reproduced, distributed and displayed at taylorsvint.tumblr.com/post/146885899701 and saved at 66.media.tumblr.com/4d716d615f6c2d6fa32641b181d5dc5e/tumblr_o9rupzaR9I1vxgtrjo8_400.jpg.

- f. March 2, 2019, for the work reproduced, distributed and displayed at taylorsvivt.tumblr.com/post/146885899701 and saved at 66.media.tumblr.com/5efa6f606b7a57523273fe9a52e0a12a/tumblr_o9rupzaR9I1vxgtrjo2_400.jpg.
- g. March 4, 2019, for the work reproduced, distributed and displayed at taylorsvivt.tumblr.com/post/146885899701 and saved at 66.media.tumblr.com/43a642fb4aa30e6229cca7068493f4ca/tumblr_o9rupzaR9I1vxgtrjo1_400.jpg.
- h. March 5, 2019, for the work reproduced, distributed and displayed at taylorsvivt.tumblr.com/post/146885899701 and saved at 66.media.tumblr.com/7105f82b8976e142f7b1e49c79d82b4c/tumblr_o9rupzaR9I1vxgtrjo5_400.jpg.
- i. March 6, 2019, for the work reproduced, distributed and displayed at taylorsvivt.tumblr.com/post/147020686786 and saved at https://66.media.tumblr.com/8ca4409e70d1f84dbb034f5fae988221/tumblr_o9so2rxvne1qfoj4do1_1280.jpg.
- j. March 8, 2019, for the work reproduced, distributed and displayed at taylorsvivt.tumblr.com/post/146885899701 and saved at

66.media.tumblr.com/f2cb3a9fe67dc1739e3f2900b8cc2b16/tumblr_o9rupzaR9I1vxgtrjo6_400.jpg.

- k. March 9, 2019, for the work reproduced, distributed and displayed at taylorsvivt.tumblr.com/post/146885899701 and saved at 66.media.tumblr.com/df0a2b3d388d32b9203581a034e1487f/tumblr_o9rupzaR9I1vxgtrjo9_400.jpg.
- l. March 11, 2019, for the work reproduced, distributed and displayed at taylorsvivt.tumblr.com/post/146885899701 and saved at 66.media.tumblr.com/4f8845209e50d1b1706d76c93421d6c0/tumblr_o9rupzaR9I1vxgtrjo7_400.jpg.

Notwithstanding those take-down notices, the taylorsvivt account remains live and active.

36. Backgrid or the predecessor in interest of certain Backgrid Photographs, AKM-GSI, sent Tumblr ***at least 31 DMCA take-down notifications*** encompassing ***at least 31 infringing photographs*** on the istalkbiebs account as set forth below, on or around:

- a. July 28, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/169293863114/bieber-news-november-15-justin-and-selena-gomez and saved at

78.media.tumblr.com/30b607f416fab4c98752a4974f290ee7/tumblr_ozirn2MEkf1qhft5ko1_r1_1280.jpg.

- b. July 30, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/169293863114/bieber-news-november-15-justin-and-selena-gomez and saved at 78.media.tumblr.com/92691258a81282453ef65edf4731f389/tumblr_ozirn2MEkf1qhft5ko8_r1_1280.jpg.
- c. July 31, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/169293863114/bieber-news-november-15-justin-and-selena-gomez and saved at 78.media.tumblr.com/9354088240e881ce35cad418a3bd5569/tumblr_ozirn2MEkf1qhft5ko5_r1_1280.jpg.
- d. August 21, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171195260074/bieber-news-february-19-justin-and-selena-gomez and saved at 78.media.tumblr.com/447a2466ef929cfa46e15f9629418901/tumblr_p4h0v8Xtmd1qhft5ko1_r1_640.jpg.
- e. August 25, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124347699/bieber-news-february-19-justin-and-selena-gomez and saved at

78.media.tumblr.com/09fbfce6826ef547ba8aeeaa7b7e2445b/tumblr_p4h0t8dGUA1qhft5ko1_1280.jpg.

f. August 28, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171195528089/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/e93981d1aad4f6a30b63ef274bd868a2/tumblr_p4it09RTc41qhft5ko1_1280.jpg.

g. August 29, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171195528089/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/0c1d54c88cb2fe0d4362e266ebf55d35/tumblr_p4it09RTc41qhft5ko4_1280.jpg.

h. September 8, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/df0b0385d3338f5762f68042e6b5029c/tumblr_p4h0y42j491qhft5ko2_1280.jpg.

i. September 9, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-newsfebruary-19-more-justin-and-selena and saved at

78.media.tumblr.com/209687c27ea3626fa5303a90fcbba44a/tumblr_p4h0y42j491qhft5ko3_1280.jpg.

- j. September 10, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/46c3c6903c37e2b9c058b845756e5cf7/tumblr_p4h0y42j491qhft5ko5_1280.jpg.
- k. September 12, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/19c6208fca4784e31aad78c9a0c0ef80/tumblr_p4h10wPltt1qhft5ko2_1280.jpg.
- l. September 13, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/93d45ab6374efeb4d59da54c69f68bd8/tumblr_p4h10wPltt1qhft5ko5_1280.jpg.
- m. September 14, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/170905447334/bieber-news-february-14-more-justin-and-selena and saved at

78.media.tumblr.com/1875bd7d19e450c40a341badac50415c/tumb
lr_p46rd85FIK1qhft5ko3_1280.jpg.

- n. September 16, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/170905428439/bieber-newsfebruary-14-more-justin-and-selena and saved at 78.media.tumblr.com/1bb1d4e3018e6b7c6ab1ce99bd325cf5/tumb
lr_p46qweDrOd1qhft5ko8_1280.jpg.
- o. September 17, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/170905428439/bieber-newsfebruary-14-more-justin-and-selena and saved at 78.media.tumblr.com/5040f705f0dc0ae413065d83f7262de7/tumb
lr_p46qweDrOd1qhft5ko9_1280.jpg.
- p. September 18, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/5deaccfd299f820fa470be61fc1058d0/tumblr
_p4h10wPlt1qhft5ko1_1280.jpg.
- q. September 19, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at

78.media.tumblr.com/2428711430927bcb2640f96c3d24bba1/tumb
lr_p4h10wPltt1qhft5ko4_1280.jpg.

- r. September 21, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/f6864d6b7275f3461cf32798a4736316/tumb
lr_p4h10wPltt1qhft5ko6_1280.jpg.
- s. September 22, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/7fa7e22c6b2c39dd7f7c4e20ffe80231/tumblr
_p4h10wPltt1qhft5ko7_1280.jpg.
- t. September 23, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/bfecfb295fc99985a4eb232481296461/tumb
lr_p4h10wPltt1qhft5ko8_1280.jpg.
- u. September 25, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at

78.media.tumblr.com/71671ee0d91131a2373f61f7060a82d8/tumblr_r_p4h10wPltt1qhft5ko10_1280.jpg.

v. September 26, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/7ce0e1bde9178d70c39afdf35a9a583/tumblr_r_p4h10wPltt1qhft5ko3_1280.jpg.

w. September 28, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124332409/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/e3be82561a078b610a514259ef49f70c/tumblr_r_p4h10wPltt1qhft5ko9_1280.jpg.

x. September 29, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/783eeeea3cce9b9be71600e838c4d9e8a/tumblr_r_p4h0y42j491qhft5ko6_1280.jpg.

y. September 30, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-newsfebruary-19-more-justin-and-selena and saved at

78.media.tumblr.com/d60e7531a0792e6018178591b67a12de/tumb
lr_p4h0y42j491qhft5ko1_1280.jpg.

z. October 2, 2018, for the work reproduced, distributed and
displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-
newsfebruary-19-more-justin-and-selena and saved at
78.media.tumblr.com/72a64288b9dbebceb886076d2ae60af8/tumb
lr_p4h0y42j491qhft5ko7_1280.jpg.

aa. October 3, 2018, for the work reproduced, distributed and
displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-
newsfebruary-19-more-justin-and-selena and saved at
78.media.tumblr.com/8867835ebbcbbcf9e5adfd8c886b3f75/tumblr
_p4h0y42j491qhft5ko4_1280.jpg.

bb. October 4, 2018, for the work reproduced, distributed and
displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-
newsfebruary-19-more-justin-and-selena and saved at
78.media.tumblr.com/edd702dfca9e6b3a6c2ccf240116084f/tumblr
_p4h0y42j491qhft5ko8_1280.jpg.

cc. October 5, 2018, for the work reproduced, distributed and
displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-
newsfebruary-19-more-justin-and-selena and saved at

78.media.tumblr.com/d0a796e026cd813bc34b56fa2e0608dc/tumblr_r_p4h0y42j491qhft5ko10_1280.jpg.

dd. October 6, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124335969/bieber-newsfebruary-19-more-justin-and-selena and saved at 78.media.tumblr.com/310948ba6846a5c501033643627ac9bc/tumblr_r_p4h0y42j491qhft5ko9_1280.jpg.

ee. October 8, 2018, for the work reproduced, distributed and displayed at istalkbiebs.tumblr.com/post/171124341829/bieber-newsfebruary-19-justin-and-selena-gomez and saved at 78.media.tumblr.com/f03df077d87291ba5931808c5ffff1c0/tumblr_r_p4h0tvFPhj1qhft5ko1_1280.jpg.

Notwithstanding Tumblr's receipt of the take-down notices alleged above, the istalkbiebs account remains live and active.

37. On information and belief, infringements that have been uploaded and saved on the Tumblr server by one user can be and are displayed on another user's account at the direction of the other user. Tumblr not only fails and refuses to take down repeat infringers who post and display unauthorized and infringing copies of Backgrid Photographs, including the timely registered Celebrity Photographs, but also fails and refuses to apply its purported take-down policy to repeat infringers

who save such infringements. For example, the Tumblr account BetterSource4You has infringed numerous photographs, including timely registered Celebrity Photographs owned or exclusively licensed by Backgrid. Notwithstanding its receipt of numerous take-down notices directed to the saved files uploaded by BetterSource4You, Tumblr has failed and refused to terminate BetterSource4You, as well as other accounts that it knows uploaded infringing content. On information and belief, BetterSource4You received at ***least 95 take-down notifications concerning 16 accounts*** displaying infringing copies of Backgrid Photographs. Instead, BetterSource4You remained live on Tumblr until receipt of Backgrid's draft complaint, which expressly identified BetterSource4You as an account that had received 95 take-down notices. *See* Exhibit C. Even though the account was taken down as a result Backgrid's settlement efforts and even though the account was a repeat infringer, the content posted by BetterSource4You remains live on other accounts that reposted its infringed content. As such, the multiplied effect of the infringement remains.

38. Backgrid and AKM-GSI's extensive but frustrated copyright enforcement efforts evidence the massive, repeated, and ongoing infringing activity permitted, facilitated, and encouraged on Tumblr accounts. In the majority of the take-down notifications, Backgrid and AKM-GSI specifically requested that Tumblr "take action" against the user immediately, but no action was taken.

Notwithstanding the frequent written demands from Backgrid and AKM-GSI, Tumblr's own Terms of Service, and the legal prerequisites for DMCA safe harbor protection, Tumblr has willfully failed and refused to terminate the accounts. Stunningly, many of the accounts that remain live and online today continue to host the infringing Backgrid Photographs specifically identified in DMCA take-down notices, and Tumblr continues to profit from the blatant, repeated, and ongoing infringements of the copyrighted works of others, including without limitation the timely registered Celebrity Photographs collectively attached as Exhibits D-1 and D-2, which are infringed by Tumblr and Automattic, respectively.

Wordpress Also Fails to Terminate Repeat Infringers as Required for Safe

Harbor Protection Under 17 U.S.C. § 512(i)

39. Backgrid has sent Wordpress ***at least 11 DMCA take-down notifications*** encompassing ***at least 11 infringing copies of Backgrid Photographs*** on the celebridadesanu account. After the eleventh notice, the account was marked as private, thereby preventing Backgrid from confirming the continued presence of infringements and thus preventing it from sending further take-down notices. Upon information and belief, the unlawful copies of the Backgrid Photographs remain displayed and continue to reside on Wordpress' server. The following

notices were sent to Wordpress regarding the celebrijadesanu account, on or around:

- a. September 26, 2019, for the work distributed and displayed at celebrijadesanu.wordpress.com/2018/01/12/britney-spears-in-a-bikini-on-the-beach-in-hawaii/ and saved at celebrijadesanu.files.wordpress.com/2018/01/britney-spears-in-a-bikini-on-the-beach-in-hawaii-2.jpg.
- b. September 26, 2019, for the work distributed and displayed at celebrijadesanu.wordpress.com/2018/01/18/sofia-richie-in-a-tiny-bikini-on-a-yacht-in-mexico/ and saved at celebrijadesanu.files.wordpress.com/2018/01/sofia-richie-in-a-tiny-bikini-on-a-yacht-in-mexico-1.jpg.
- c. September 27, 2019, for the work distributed and displayed at celebrijadesanu.wordpress.com/2018/01/12/britney-spears-in-a-bikini-on-the-beach-in-hawaii/ and saved at celebrijadesanu.files.wordpress.com/2018/01/britney-spears-in-a-bikini-on-the-beach-in-hawaii-3.jpg.
- d. September 27, 2019, for the work reproduced, distributed and displayed at celebrijadesanu.wordpress.com/2016/08/23/courtney-stodden-at-the-beach-in-venice/ at saved at

celebridadesanu.files.wordpress.com/2016/08/courtney-stodden-at-the-beach-in-venice-1.jpg.

- e. September 30, 2019, for the work distributed and displayed at
celebridadesanu.wordpress.com/2018/01/18/sofia-richie-in-a-tiny-bikini-on-a-yacht-in-mexico/ and saved at
celebridadesanu.files.wordpress.com/2018/01/sofia-richie-in-a-tiny-bikini-on-a-yacht-in-mexico-10.jpg.
- f. October 3, 2019, for the work distributed and displayed at
celebridadesanu.wordpress.com/2018/01/12/britney-spears-in-a-bikini-on-the-beach-in-hawaii/ and saved at
celebridadesanu.files.wordpress.com/2018/01/britney-spears-in-a-bikini-on-the-beach-in-hawaii-5.jpg.
- g. October 6, 2019, for the work distributed and displayed at
celebridadesanu.wordpress.com/2018/01/12/britney-spears-in-a-bikini-on-the-beach-in-hawaii/ and saved at
celebridadesanu.files.wordpress.com/2018/01/britney-spears-in-a-bikini-on-the-beach-in-hawaii-6.jpg.
- h. October 6, 2019, for the work reproduced, distributed and displayed at
celebridadesanu.wordpress.com/2017/09/18/nikki-

bella/ and saved at

celebridadesanu.files.wordpress.com/2017/09/nikki-bella-2.jpg.

- i. October 7, 2019, for the work reproduced, distributed and displayed at celebridadesanu.wordpress.com/2018/01/12/britney-spears-in-a-bikini-on-the-beach-in-hawaii/at saved at celebridadesanu.files.wordpress.com/2018/01/britney-spears-in-a-bikini-on-the-beach-in-hawaii-9.jpg.
- j. October 8, 2019, for the work reproduced, distributed and displayed at celebridadesanu.wordpress.com/2017/09/18/nikki-bella/ saved at celebridadesanu.files.wordpress.com/2017/09/nikki-bella-3.jpg.
- k. October 9, 2019, for the work reproduced, distributed and displayed at celebridadesanu.wordpress.com/2018/01/12/britney-spears-in-a-bikini-on-the-beach-in-hawaii/and saved at celebridadesanu.files.wordpress.com/2018/01/britney-spears-in-a-bikini-on-the-beach-in-hawaii-7.jpg.
- l. October 11, 2019, for the work reproduced, distributed and displayed at celebridadesanu.wordpress.com/2017/11/15/sofia-richie-6/ and saved at celebridadesanu.files.wordpress.com/2017/11/sofia-richie-3.jpg.

Despite the takedown notices as outlined above, the celebridadesanu account remains live and active.

40. Backgrid has sent Wordpress ***at least 15 DMCA take-down notifications*** encompassing ***at least 15 infringing photographs*** on the ubertalks account. The following notices were sent to Wordpress regarding the ubertalks account:

- a. September 26, 2019, for the work distributed and displayed at <ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/> and saved at i0.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC831500000578-3672999-image-a-53_1467599733627.jpg.
- b. September 27, 2019, for the work distributed and displayed at <ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/> and saved at i0.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC833400000578-3672999-image-m-60_1467600146389.jpg
- c. September 30, 2019 for the work distributed and displayed at <ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/>

her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and

saved at

[i0.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC833D00000578-3672999-image-a-50_1467599527766.jpg](http://i.dailymail.co.uk/i/pix/2016/07/04/03/35EC833D00000578-3672999-image-a-50_1467599527766.jpg).

- d. October 8, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at

i0.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC83E200000578-3672999-image-m-43_1467598495764.jpg.

- e. October 9, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at

i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35ECE92000000578-3672999-image-a-49_1467599369653.jpg.

- f. October 10, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at

i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35ECE94100000

578-3672999-image-m-48_1467599267539.jpg.

g. October 11, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-
her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at

i0.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC85A900000

578-3672999-image-a-45_1467599080817.jpg.

h. October 12, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-
her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at

i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35ECE94E00000

578-3672999-image-a-46_1467599216520.jpg.

i. October 15, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-
her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at

i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35ECE91300000

578-3672999-image-a-64_1467600552155.jpg.

- j. October 18, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at
i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35ECA0FA00000578-3672999-image-m-31_1467597985901.jpg.
- k. October 19, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at
i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC895400000578-3672999-image-a-61_1467600319781.jpg.
- l. October 20, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and
saved at
i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC891C00000578-3672999-image-a-52_1467599607760.jpg.
- m. October 22, 2019 for the work distributed and displayed at
ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/

her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/ and

saved at

<i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC83E200000>

578-3672999-image-m-43_1467598495764.jpg.

n. October 24, 2019 for the work distributed and displayed at
<ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/> and
saved at

<i2.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35EC83CE00000>

578-3672999-image-a-51_1467599547934.jpg.

o. October 28, 2019 for the work distributed and displayed at
<ubertalks.wordpress.com/2016/07/04/photos-gigi-hadid-shows-off-her-enviably-pert-posterior-at-taylor-swifts-vip-beach-bash/> and
saved at

<i1.wp.com/i.dailymail.co.uk/i/pix/2016/07/04/03/35ECE93100000>

578-3672999-image-m-66_1467600643684.jpg.

Despite the takedown notices as outlined above, the ubertalks account remains live and active.

Defendants Do Not Expeditiously Remove Infringements as Required for Safe Harbor Protections Under 17 U.S.C. 512(b)-(d)

41. As shown above, defendants fail and refuse to expeditiously remove infringing content notwithstanding their receipt of take-down notices putting them on notice of infringements. To enjoy safe harbor protection, an ISP must “upon notification of claimed infringement respond [] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of the infringing activity.” 17 U.S.C. §§ 512(b)(2)(E), 512(c)(1)(C), 512(d)(3).

42. Defendants’ users have reproduced, publicly displayed, and publicly distributed, and continue to reproduce, publicly display and publicly distribute, Celebrity Photographs by making them available for download, copy, and reproduction, together with other photographs that Backgrid either owns or exclusively licenses for distribution, reproduction, public display, and use in creating derivative works.

Tumblr Has Ignored Notices Relating to Stored and Displayed Infringements Since at Least July 2018

43. Backgrid has caused many thousands of DMCA take-down notifications to issue against Tumblr since as early as July 2018, but Tumblr has failed to expeditiously remove the infringements. Stunningly, certain Celebrity Photographs remain live on Tumblr even though Backgrid sent DMCA notices

twice, once during enforcement and again during prelitigation discussions. For example, Backgrid sent a take-down notice for the timely registered photograph of actor and model Eddie Redmayne displayed at chrissallans.tumblr.com/post/140397483779/eddie-redmayne-for-pm-giftededdieredmayne (Exhibit E) and located at 78.media.tumblr.com/7077f48dbef516a8b0152c8c1c67b774/tumblr_o3fkvrrQam1v27dy5o1_1280.jpg (Exhibit F) to Tumblr's DMCA agent ***on or about July 27, 2018***. Backgrid sent the take-down notice a ***second time*** to Tumblr's DMCA agent, ***in addition*** to its registered agent for service of process, on or about May 17, 2019. And in addition to the DMCA notice sent twice, Backgrid provided a third notice of this infringement on or about January 3, 2020. The photograph, both as a stored copy and as a displayed copy, remains live.

Automattic Ignores DMCA Notices Relating to Stored and Displayed

Embedded Infringements That Are Still Live

44. Backgrid caused hundreds of take-down notices to be issued to Automattic with respect to its Wordpress platform. Like its Tumblr subsidiary, Automattic failed to expeditiously take down numerous instances of infringement, including infringements stored on the Wordpress platform and when it is displayed on Wordpress by and through an embedded display. In response to DMCA notices relating to embedded infringements, Wordpress responded, "The material at issue

— which has been directly linked or embedded from another site — is not hosted on WordPress.com. Please file a complaint with the third-party site or its web host to have the material removed.” Thus, ignoring the take-down notices, Wordpress has failed to expeditiously remove or disable access to the infringement as is required for safe harbor protection under 17 U.S.C. § 512(c) and (d), respectively. Such infringement remains live on the Wordpress platform.

Automattic Keeps Cached Copies of Infringements “Forever”
and Refuses to Take the Infringements Down

45. On information and belief, Automattic claims that it is shielded from liability when it creates a cached copy of infringing photographs. On information and belief, it claims that such activity falls under the safe harbor provision of Section 512(b). Backgrid sent numerous notices with respect to content that was purportedly cached by Automattic and saved on Automattic’s services for at least two years. For example, on or around September 26, 2019, Backgrid sent a DMCA take-down notification with respect to an image of Tom Cruise filming the Top Gun sequel saved at i0.wp.com/blackchristiannews.com/wp-content/uploads/2018/10/tom10.jpg and displayed at bcnn1wp.wordpress.com/2018/10/12/tom-cruise-56-looks-like-he-hasnt-aged-a-bit-as-he-begins-filming-top-gun-sequel-after-starring-in-the-original-32-year/. In response to the DMCA take-down notice, as well as others sent by Backgrid,

Automattic explained that “[t]he content that you have specified is served through Wordpress.com’s servers by our Photon service, which is a caching service that proxies third party images through our own server. So, we act as cache only with respect to these images.” On information and belief, Photon is a service offered and operated by Automattic for Jetpack-connected Wordpress sites. Despite the DMCA notice, the image remains live.

46. Section 512(b) provides for a safe harbor for system caching so long as the ISP follows specific requirements. Section 512(b) provides that an ISP is not liable for monetary damages if the infringement is “by reason of the intermediate and ***temporary*** storage of material on a system,” among other requirements (emphasis added).

47. Automattic’s activity does not satisfy the Section 512(b) requirements, because, among other things, the cached copy saved and “served” through its servers is not temporary. Automattic admits at developer.wordpress.com/docs/photon that there is “no cache invalidation – currently the images are cached ‘***forever***.’ If you want to ‘refresh’ an image you will need to change the name of the image” (emphasis added). A true and correct copy of its admission is attached as Exhibit G. A review of the cached images themselves reveals that the cache is set to become invalid after two years. A true and correct copy of an example of the same is attached as Exhibit H. As such, the

cached copy is not temporary and the 512(b) safe harbor does not protect Automattic.

CLAIM FOR RELIEF

(Direct, Contributory, and Vicarious Copyright

Infringement, 17 U.S.C. § 501)

(Against all Defendants)

48. Backgrid incorporates by reference the allegations in paragraphs 1 through 47, above, as though set forth at length.

49. The Celebrity Photographs consist substantially of material that is wholly original and contain copyrightable subject matter, as the United States Copyright Office implicitly recognized in according them registration. Each of the Celebrity Photographs was either lawfully registered by Backgrid or assigned to it, including all rights of copyright thereto, by AKM-GSI. Accordingly, Backgrid now owns all rights of copyright, title, and interest in the Celebrity Photographs and each of the Celebrity Photographs contains protectable subject matter.

50. Each Celebrity Photograph was registered with the United States Copyright Office within 90 days of publication and/or before it was infringed. Accordingly, Backgrid is entitled to all legally available relief for its infringement, including without limitation temporary, preliminary, and permanent injunctive

relief, the recovery of actual damages and lost profits or statutory damages, and an award of costs and attorneys' fees.

51. As of the filing of this Complaint, Tumblr had infringed at least **1006** Celebrity Photographs and Automattic had infringed at least **360** Celebrity Photographs, as reflected in the exhibits D-1 and D-2 hereto and incorporated herein. The infringed Celebrity Photographs identified in the attached exhibits are merely illustrative; defendants' acts of infringement are continuous and on-going and additional infringements of Celebrity Photographs—both those that have already occurred and those that occur pre-discovery—will doubtless be discovered. Accordingly, Backgrid seeks, and is entitled to, its full legal remedies with respect to each act of infringement proved whether or not specifically alleged herein.

52. Defendants have directly infringed and continue to directly infringe the Celebrity Photographs, including without limitation by preparing them for uploading by stripping their metadata, continuing to display them long after being apprised of their infringing status, assigning their own identification numbers to the Celebrity Photos, using Tumblr's dashboard feature to choose and arrange infringing content, and continuing to store copies of them on defendants' servers without Backgrid's consent.

53. Defendants have contributorily infringed the Celebrity Photographs, including without limitation by suggesting to their users that the users upload

photographs found on the Internet, providing a tool to enable their users to do so easily, failing to advise users that civil and criminal penalties attach to the unauthorized copying, posting, and public display of copyrighted photographs, and by removing from each Celebrity Photograph that is unlawfully posted and displayed all information identifying it as protected by copyright, all information identifying its copyright holder, and all information concerning its availability for licensing.

54. Defendants have vicariously infringed the Celebrity Photographs, including without limitation by providing a tool to enable their infringement and by allowing their customers to hide infringements by making private accounts that have been identified as hotbeds of infringement.

55. Defendants' acts of direct, contributory, and vicarious infringement have been and are willful as demonstrated by, inter alia, their numerous claims that they never received take-down notices, their consistent failure to act on take-down notices expeditiously—or at all, their failure and refusal to bar repeat infringers from using their websites, and their failure and refusal to apply their own Terms of Service to their users.

56. Defendants' acts alleged herein have been and are being performed without the permission, license, or consent of Backgrid.

57. As a result of defendants' acts alleged herein, Backgrid has suffered substantial economic damage in an amount to be proved at trial.

58. Defendants have willfully infringed, and unless enjoined will continue to willfully infringe, Backgrid's copyrights by continuing to engage in the acts alleged herein.

59. Defendants' wrongful acts of have caused, and are continuing to cause, injury to Backgrid in an amount that cannot be accurately computed. Unless this Court temporarily, preliminarily, and permanently restrains defendants from the further commission of such acts, Backgrid will suffer irreparable injury for which it will not have an adequate remedy at law. Accordingly, Backgrid seeks a declaration that defendants are infringing Backgrid's copyrights and appropriate orders under 17 U.S.C. § 502 enjoining defendants from any further acts of infringement.

60. In light of the willful and egregious nature of their acts of copyright infringement, Backgrid is also entitled to an award of \$150,000 per photograph in statutory damages.

61. Backgrid is additionally entitled to an award of its costs and attorneys' fees from each defendant.

PRAYER FOR RELIEF

WHEREFORE, Backgrid requests judgment against defendants as follows:

1. That defendants, their officers, agents, servants, employees, and representatives, and all persons in active concert or participation with them, be temporarily, preliminarily, and permanently enjoined from copying, reproducing, displaying, promoting, advertising, distributing, or selling, or engaging in any other form of dealing or transaction in, any and all photographs whose copyrights are owned by Backgrid;
2. That an accounting pursuant to 17 U.S.C. §§ 504 (a)(1) & (b) be made of all profits, income, receipts or other benefit derived by defendants from the unlawful reproduction, copying, display, promotion, distribution, or sale of products and services, or other media, either now known or hereafter devised, that improperly or unlawfully infringed upon Backgrid's copyrights;
3. For actual damages for copyright infringement pursuant to 17 U.S.C. §§ 504 (a)(1) & (b);
4. For statutory damages for copyright infringement, including willful infringement, in accordance with 17 U.S.C. §§ 504(a)(2) & (c);
5. For costs, interest and reasonable attorney's fees pursuant to 17 U.S.C. § 505; and

6. For such other and further relief as the Court deem just and appropriate.

Dated: April 21, 2020

ONE LLP

By: /s/ Joanna Ardalan

Joanna Ardalan
David W. Quinto
Peter R. Afrasiabi

Attorneys for Plaintiff
Backgrid USA, Inc.

DEMAND FOR JURY TRIAL

Plaintiff Backgrid USA, Inc., hereby demands trial by jury of all issues so triable under the law.

Dated: April 21, 2020

ONE LLP

By: /s/ Joanna Ardalan (Pro Hac Vice Pending)
Joanna Ardalan
David W. Quinto
Peter R. Afrasiabi

Attorneys for Plaintiff
Backgrid USA, Inc.